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PART ONE
THE COMMON LAW IN THE LATE NINETEENTH CENTURY

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PREFACE

The purpose of these materials is to present some distinctive ways of thinking about law, especially the common law. We shall consider the thinking of lawyers from the late nineteenth century to the present about the structure of the common law, how it is made, its legitimacy, and how judges and lawyers reason. Some of the ways of thinking we shall present are different than the ways of thinking you are learning, but not entirely different - our story will contain both continuity and discontinuity. These lawyers are your intellectual ancestors, and large parts of their thought continue - transformed perhaps, but still powerful. We hope that understanding them will help you understand law school.

A READER'S GUIDE TO PARTS ONE AND TWO

Part I is about common law thought in the late nineteenth century. The title "rule of law" has no magic or authority, and it is chosen for two reasons: first, it suggests much of the larger body of thought of which this thought about the common law is a part, especially thought about the individual and the state. Second, it is better than the others that have been used: "black letter tradition" and "formalism" seem too pejorative; "classical" has all sorts of misleading suggestions, and "liberal legal thought" may suggest that this thought was no more than an expression of liberal political faith.

The first two items, Sugarman and Gordon, are excerpts from recent articles, and are included to give a general survey. Sugarman is about a small group of scholars in England (and more particularly at Oxford), who reconstituted the common law and articulated the dominant modes of thought. Gordon is more general survey of thought in the United States. We include both because the thinking we seek to describe was substantially the same in England, the United States and Canada, and because two explanations may be more useful than one. Throughout this part, ask yourself whether Sugarman and Gordon have described their lawyers' minds usefully and accurately.

The next two items, Langdell and Reeve, are writing about legal education; Langdell was dean of Harvard Law School, and his Preface to his contracts casebook is a famous landmark in the making of the "case system," which, you will have already observed, continues as a powerful element of legal education. Reeve was principal of Osgoode Hall Law School. This address, which was given at the opening of a new programme in the school that included a substantial element of lectures, is far from famous, but is an expression of much the same approach. Our primary interest is not in their beliefs about teaching, but their understandings of the common law. For them, what is the structure of the common law, and how do judges decide cases?

The article by Salmond is a statement of the beliefs and rules about precedent around 1900; you need not master the particular terminology he uses, but note the justifications for following precedent, the importance of single cases, and the distinction between making law and the obligation to follow settled doctrine. Next comes writing by Pollock and Dicey, who were two of the scholars whom Sugarman describes. Pollock was at the centre of the legal world for decades; he was a professor at Oxford, the editor of the Law Reports from 1895 to 1935, and editor of the Law Quarterly Review from 1883 to 1919. He wrote a large pile of books,

especially texts, some of which have become standard references and continue to be revised by a succession of editors. Dicey, too, was a professor at Oxford, and also deeply involved in political affairs. His most famous two books are The Law of the Constitution, which immediately became the central constitutional text for English lawyers, and is probably the most comprehensive and articulate statement of the rule of law thought, and Law And Opinion in the Nineteenth Century, an account of the relation between law and public opinion. The excerpts from their writings are probably more difficult to understand than the excerpts from Langdell, Reeve and Salmond. We have chosen them to illustrate thinking about common law generally and especially the problem that they perceived as the question, do judges make law? which was a question that most of the thinkers in this period struggled with in one form or another. Pollock's article "The Vocation of the Common Law " was a speech he gave at Harvard Law School. It and his article about the science of case law reveal much about his understandings of the common law, especially the relation between law and its context and how law changes. (And those of you who have a background in science can consider his understanding of the scientific method.) In reading Dicey, note especially how he seeks to distinguish courts from legislatures.

The excerpts from Lefroy's two articles are included because he was a Canadian and because they are arguably the best discussion of the question about making law in England or Canada. Note his understanding of making law, the sources from which judges make law, the ways they make law, and the distinction between courts and legislatures. Last, the passage from Anson on Contracts is included as an example of the writing done in this period.

Part II is about thought in the early twentieth century, especially the challenges to the late nineteenth century thought. The first reading, by White, is a general survey of thought in the United States from about 1900 to the early 1930s. The next four items are excerpts from articles by Pound, who was a professor and later dean at Harvard. What claims does he make for rejecting the late nineteenth century thought, and what does he propose instead? Next come five excerpts from writing by the realists, who were a loosely associated group of American scholars in the late 1920s and the 1930s. The questions we asked about Pound must also be asked about the realists. Also, what are the differences between them and Pound?

Last, there are two excerpts from the writing of Wright. He was a professor at Osgoode Hall, and later dean here, and one of major figures in Canadian legal thought and education. It may help to know that he did graduate work at Harvard under Pound.